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MEASURES TO IMPROVE THE SITUATION AND ENSURE THE HUMAN RIGHTS AND DIGNITY OF ALL MIGRANT WORKERS

Written statement submitted by Pax Romana, a non-governmental organization in consultative status (Category II)

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[20 March 1996]

Asylum policies in the European Union territories under the Schengen Agreement

1. Section 2.8 of the Final Declaration of the Humanitarian Summit held in Madrid in December 1995 determined that the rights of refugees to seek and obtain asylum in third countries to escape from persecution must be promoted.

2. The European covenants currently in effect in this regard are: the 1990 Covenant on the Implementation of the Schengen Agreement and the 1990 Dublin Covenant on States' Jurisdiction to Examine Asylum Applications. Despite the fact that both international instruments specifically refer to the rules and aims of the 1951 Geneva Convention on the Status of Refugees (modified by the 1967 New York Protocol), some evidence leads us to think that such an assumption is not complete since:

(a) The harmonization of national rules on the granting of asylum status in favour of a supranational authority (according to the Schengen principles) somehow implies a lesser State responsibility to expel asylum-seekers or to reject asylum applications at borders;

(b) Such covenants also impose some duties to control passengers on transport enterprises. It represents an unfair delegation of public powers in favour of private persons to determine each migrant worker or refugee's status, without proper proceedings. The prior control of passengers is, therefore, left to unqualified employees, as denounced by some other non-governmental organizations such as Amnesty International;

(c) Although the covenants have not decreed a coherent policy on the granting of asylum, they have inspired a restrictive policy to diminish the numbers of asylum petitions and to mask an anti-migration strategy.

3. Even the European Parliament already expressed its deep concern in 1991 about the obstacles and negative consequences that the Schengen Agreement could have on the entry of refugees and migrant workers into territories governed by the Schengen and Dublin Covenants. The Parliament also remarked that those Covenants might either grant some overriding control faculties to the police or even endanger the judicial protection system, the right of migrant persons to defence and to privacy.

4. The European Union Treaty has not put an end to that question either. Sections K1 and K2 of the Maastricht Treaty recognize the common European interest in asylum-granting policy, allowing national legislation to determine this matter, always under the rules of the Geneva Convention.

5. Therefore, the laws on asylum of every Schengen signatory State are fixing restrictive criteria for granting such status in order to prevent economic migration from being recognized under humanitarian status (this idea is clearly stated in the foreword to some national acts). Obvious problems are arising out of the implementation of such acts:

(a) Since the Schengen Agreement, the European Union States' asylum policies have changed their aim on the basis of an almost impossible distinction between "true" and "false" asylum-seekers. This new strategy has been assumed by most of the Western European countries: Germany (dated 9 July 1990 and 27 July 1993); Netherlands (dated 7 September 1993); Belgium (dated 6 May 1993); United Kingdom (dated 1993); and France (dated 24 September and 30 December 1993). The possibilities and conditions for seeking asylum appeared to be unfairly reduced in all of them, to prevent illegal migration;

(b) The above-mentioned German act distinguishes between "safe" and "unsafe" States, the latter being specified in annex II to the act itself (Bulgaria, Gambia, Ghana, Hungary, Poland, Romania, Senegal, Slovakia and Czech Republic). Applications being submitted by asylum-seekers from such countries will prima facie be considered clearly groundless, unless some piece of evidence is introduced that attests to real political persecution "exceptionally" taking place there. Such an onus probandi inversion implies a presumption of groundless asylum petitions from those countries, a doubtful measure as regards the human right to impartiality and to fair defence;

(c) Some of the provisions relating to non-acceptance of asylum applications decreed by the Spanish act of 1994 contain several practical contradictions with the national Constitution. The Spanish asylum act, as

regards non-acceptance at borders, allows detention of the asylum-seeker during four to seven days by an administrative official, whereas section 17 of the national Constitution recognizes the right to freedom and prohibits an administrative authority to detain anyone more than 72 hours without permission of the judge. Moreover, as regards section 81 of the Constitution itself, the approval of an act that may represent a restriction of fundamental rights, like this, should have been voted in the Parliament with a qualified majority, which was not the case. Another issue arises in the same act: non-acceptance because of allegedly "clearly groundless" facts or data. The police normally reject asylum applications by alleging vague reasons and without giving grounds for their decision. A kind of "obvious groundless asylum petition" is presumed, which proves to be a restrictive practice. Nevertheless and according to section 13 of the Spanish Constitution, there should be the broadest interpretation of the right to asylum as a fundamental-right. In this regard, our organization wants to quote the words of the first assistant to the Spanish Ombudsman, who recently stated that only in exceptional cases "the acceptance of an asylum petition may be denied".

6. The Dublin Covenant establishes rules to specify States' jurisdiction to consider asylum petitions with a possible exception based on an ambiguous term: "humanitarian case". The uncertainty of the above concept as well as the notion of asylum may lead to possible arbitrariness. Following the partial lifting of sanctions against the former Yugoslavia, for example, some Western European States have announced the repatriation of 400,000 ethnic Albanian asylum-seekers from Kosovo who had formerly been admitted because of humanitarian reasons, although no possibility of integration in Kosovo may be foreseen for them yet. Is that not an example of arbitrariness and international lack of solidarity? How can we expect that underdeveloped countries are going to accept asylum-seekers and refugees in their territories if the developed countries are reluctant to?

7. Only if States distinguish between illegal migration and asylum policies, will an improvement in the recognition of the latter occur. Nowadays States are reducing the granting of asylum status by considering it a possible way of entry for illegal economic migration.

8. Thus, we propose that in a specific resolution on this item the Commission endorse Sub-Commission resolution 1995/13 and Commission resolution 1995/88 and recommend, with special attention to the asylum-seekers, that:

(a) Asylum status also be granted to persons persecuted by non-State agents, as proposed by UNHCR at the end of 1995;

(b) A new definition of the concept of asylum be elaborated, adapted to existing reality, with the purpose of separating asylum policy from general migrant worker policy;

(c) International conditions that promote asylum status and the possibilities of obtaining it, even in Western countries, be expanded.